No. 22,560

IN THE

United States Court of Appeals

For the Ninth Circuit

PSG Co., a corporation,
and PHILIP S. GREENBERG,
Appellants,

vs.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
Appellee.

Appeal from the United States District Court for the District of Oregon

Honorable Robert C. Belloni, Judge

APPELLANTS' OPENING BRIEF

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I

INTRODUCTION

This case involves trading in sugar futures commodity contracts. It arose out of alleged breaches of duties owed by a commodities brokerage house to its customer.

Jurisdiction of the trial court is found in 28 U.S.C. 1332 upon the allegations of the Complaint (Cl. Tr. p. 1) that plaintiffs are an Oregon corporation and

Oregon citizen suing a Delaware corporation, with the amount in controversy exceeding the sum of $10,000.00, exclusive of interest and costs.

Plaintiff's appeal from adverse rulings of the trial court; the jurisdiction of this court is therefore found in 28 U.S.C. 1291.

II

STATEMENT OF THE CASE

The Complaint alleges that plaintiff Philip Greenberg and his corporation, PSG Co. [both hereinafter referred to, for convenience, as "plaintiff"] entered into agreements with defendant brokerage house whereby defendant agreed to accept plaintiff's business of buying and selling commodity futures contracts up to a maximum of 300 contracts open at any one time; if defendant desired to modify the said agreement it would give plaintiff reasonable notice before undertaking to do so. (Cl. Tr. p. 2.)

The Complaint further alleges that on October 22, 1965, at a time when plaintiff held with defendant some 587 sugar contracts, representing a total value of $1,859,887.40, with 207 contracts open, with plaintiff in full compliance with defendant's margin and other requirements, defendant suddenly, without advance notice, at 6:15 A.M. in the morning, immediately prior to the opening of trading on the commodity exchanges that day, notified plaintiff that, starting immediately, it would accept liquidating orders only

from plaintiff, with a limit of only 100 contracts open. (Cl. Tr. p. 3.)

The Complaint further alleges that defendant well knew that it was plaintiff's exclusive broker and that plaintiff had to continue to trade in the sugar futures market or suffer economically, that plaintiff could not trade through any other broker for some several days thereafter until plaintiff could establish new arrangements with another broker. (Cl. Tr. p. 4.) It is alleged that defendant knew, prior to the said day of October 22, 1965 that the said action of reducing pliantiff's limits was to be taken by defendant but instructed its employees not to inform plaintiffs of such pending action. (Cl. Tr. p. 4.)

The Complaint alleges that such conduct of defendant was unreasonable, arbitrary and in bad faith and in breach of the foregoing agreements between the parties and of the fiduciary duties owed by defendant to plaintiffs. (Cl. Tr. p. 4.) The Complaint alleges that plaintiffs thereafter attempted to place trading orders with defendant but that the same were refused, but that defendant continued to act as broker for plaintiffs by accepting liquidating orders. (Cl. Tr. p. 5.) The Complaint alleges that as a proximate result of the said conduct of defendant plaintiff suffered a loss from the refusal of defendant to accept the above described orders of plaintiffs in the amount of $45,221.68. (Cl. Tr. p. 5.)

The Complaint further alleges that defendant's conduct was done willfully, wantonly and maliciously and with a deliberate intent to injure plaintiff and prays

for exemplary damages in the amount of $500,000.00. (Cl. Tr. p. 5.)

The Complaint alleged a second cause of action, commonly known as the "Brazil" matter and a third cause of action concerning payment of certain telephone charges (Cl. Tr. pp. 5, 6); these latter matters, together with a counterclaim filed by defendant (Cl. Tr. p. 41) were settled at the time of trial (Cl. Tr. p. 88) and are not involved in the instant appeal.

Plaintiffs demanded a jury trial. (Cl. Tr. p. 6.)

Defendant's answer (Cl. Tr. pp. 38, et seq.) denies the allegation of an agreement for defendant to carry a total of 300 open contracts with plaintiff; admits that plaintiff did substantial business with defendant, that plaintiff had 207 open contracts with defendant immediately prior to October 22, 1965 and that on October 22, 1965 at approximately 6:15 A.M. it informed plaintiff that, starting immediately, the only orders which it would accept from plaintiff would be liquidating orders. (Cl. Tr. pp. 39, 40.) The answer further admits that subsequent to October 22, 1965 it continued to act as broker for plaintiff by accepting liquidating orders from plaintiff. (Cl. Tr. p. 40.)

Extraordinarily extensive and bitterly contested discovery proceedings were thereafter had. (Cl. Tr. pp. 96-99.)

Before pretrial plaintiff sought to include in the issues the charge that defendant in handling plaintiff's accounts was guilty of a violation of the Rob-

inson-Patman Act (15 U.S.C. 13(c)) or, in the alternative, a claim for return of fraudently obtained commissions based upon defendant's secretly acting for itself contrary to the interest of plaintiff with respect to commodity futures orders. (Cl. Tr. p. 450.) This motion was denied. (Cl. Tr. p. 72.)

At the trial, before a jury, the court during the first day of trial granted defendant's motion to remove the issue of punitive damages form the case. (Cl Tr. p. 100.)

Thereafter the trial court, at the conclusion of plaintiff's case, granted defendant's motion to dismiss plaintiff's Complaint (Cl. Tr. p. 100), and entered judgment thereon. (Cl. Tr. p. 87.)

III

SPECIFICATION OF ERRORS

Appellant respectfully contends that the trial court committed the following three principal errors:

1. It erroneously took the case from the jury by granting defendant's motion to dismiss at the end of plaintiff's case. (Rep. Tr. p. 270.)

2. It erroneously took from the jury the issue of punitive damages during the first day of trial. (Rep. Tr. pp. 79, 113.)

3. It erred, at pre-trial, in refusing to permit the issue of defendant's alleged violation of the Robinson-Patman Act in handling the account to be brought before the jury in this case. (Cl. Tr. p. 72.)

IV

ARGUMENT

A. DISMISSAL OF PLAINTIFF'S COMPLAINT

As recited above at the conclusion of plaintiff's case defendant moved to dismiss the first cause of action (Rep. Tr. p. 248.) The court granted the motion to dismiss. (Rep. Tr. p. 270.)

It is respectfully submitted that such action of the court in granting the motion to dismiss constitutes reversable error, both procedurally and in substance.

1. Procedural Error in Granting Motion to Dismiss.

Appellant contends that a motion to dismiss does not lie in a jury case. Rule 41(b) F.R.C.P. provides that in a *non*-jury case the court may grant a motion to dismiss at the conclusion of plaintiff's case. As is pointed out in the Notes of the Advisory Committee on Rules (28 U.S.C.A. 1967 pocket part, p. 91), a motion to dismiss has not been available in a jury case since the 1963 amendment to said rule.

Secondly, even were a motion to dismiss available in the instant jury case, the court in granting the same would be required by the said rule to make specific findings, so that its factual determinations might clearly appear on the record. (See *Young v. U.S.* (9th Circuit), 111 Fed. 2d 823; *Mateas v. Fred Harvey,* (9th Circuit) 146 Fed. 2d 989.) No findings of any sort were made in this case, so there is no support for the judgment (Cl. Tr. p. 87), as is required by Rule 41(b).

It should be noted that the form of the judgment refers to a motion for directed verdict in its prefatory language (Cl. Tr. p. 87, l. 20) but the adjudication grants a dismissal of the action; it does not grant a directed verdict. In any event, the record is clear that no motion for directed verdict was ever made. (Rep. Tr. pp. 248-270.) This court has held that the trial court in a jury case cannot order judgment where no motion for directed verdict has been made *(Guerrero v. American-Hawaiian Steamship Co.,* 222 Fed. 2d 238, 244.)

The two motions, of course, are not the same, at least since the 1963 amendment to F.R.C.P. 41(b). The granting of a motion to dismiss, such as was done here, determines disputed fact issues, and therefore requires findings, whereas the granting of a directed verdict determines points of law. For a pre-1963 discussion of the distinction between the two motions see comments of Judge Healy in dissenting opinion in *Mateas v. Fred Harvey,* 146 Fed. 2d 989, 993.

2. Granting of Motion Was Wrong in Substance.

a. Fact Issue of Notice.

As noted above, no findings were made by the trial court, so that we cannot know the exact basis upon which the court ordered judgment. The reporter's transcript contains comments by the court from which it might be inferred that the court was making the following factual determinations:

(1) that the evidence showed a binding promise by defendant to handle all of plaintiff's business up to 300 contracts open;

(2) that plaintiff built up his business in reliance upon this binding promise but

(3) such promise was terminable at will (Rep. Tr. p. 269).

It hardly needs citation of authority that the trial court cannot make such factual determinations in a jury case unless there is no evidence upon which the jury could base a contrary finding *(Marks v. Barbara* (9th Circuit) 274 Fed. 2d 934). The record reveals a great deal of evidence to the contrary, most of which was cited to the court at the time of arguing the motion to dismiss (Rep. Tr. pp. 251-259). The parties are agreed there is nothing in writing on the issue. At the time of the ruling the following evidence was before the jury from which the jury might well have concluded that defendant was required to give reasonable notice before reducing plaintiff's limits from 300 to 100.

(1) Plaintiff, who was experienced in the business, (Rep. Tr. p. 81) testified that it was the custom of the trade to give notice under the circumstances involved here. (Rep. Tr. p. 95, 191.) No notice was given him. (Rep. Tr. p. 41.)

(2) Plaintiff testified without objection that it was understood between the parties that proper notice would be given. (Rep. Tr. p. 92.)

(3) Plaintiff's expert in the trade (Rep. Tr. p. 129-131), Mr. Engelmohr, testified that it is the custom in the business for the brokerage house to give rea-

sonable advance notice under the circumstances here involved. (Rep. Tr. p. 131-132.)

(4) Mr. Engelmohr further testified, as an expert in the field, that he "could not conceive" of a brokerage house committing such an act as defendant committed in this case [that is arbitrarily lowering trading limits without advance notice]. (Rep. Tr. p. 136.)

(5) Mr. Engelmohr further testified that he had never in all of his experience encountered such an act as defendant committed in this case. (Rep. Tr. p. 152.)

(6) Defendant itself, in the deposition of one of its principal officers, admitted that, had it known that plaintiff had not been told ahead of time about his reduction in limits, defendant could not have done what it did. (Rep. Tr. p. 214.) As noted above, plaintiff testified no notice was given. (Rep. Tr. p. 41.)

(7) The law itself requires the giving of reasonable notice concerning a change in the relationship between broker and client where the agreement does not specify the notice to be given. (Rep. Tr. p. 93.) See for example, *Rembert v. Fenner and Beane,* 173 Southern 551, 555 where this very defendant, in another law suit, argued that the law relating to brokers required reasonable notice:

> "Counsel [for Fenner and Beane] also point to the fact that it is generally recognized both here and elsewhere, that the relationship of principal and agent is terminable at the will of either

party, *subject, of course, to reasonable notice.*" (Emphasis added.)

To the same effect, that is, that the law requires reasonable notice under the circumstances here presented, see also *Smith v. Craig,* 221 N.Y. 456; 105 N.E. 798; *Rosenthal v. Brown,* 160 N.E. 921; *Small v. Housman,* 208 N.Y. 115, 101 N.E. 700; Meyers, *The Law of Stock Brokers and Stock Exchanges,* sec. 79.

The question of what is reasonable notice is a fact question to be determined by the *jury.* See *Small v. Housman,* 208 N.Y. 115, 101 N.E. 700; *Landow v. Grey,* 232 N.Y.S.2d 247, 253, and cases there cited; *Thompson v. Baily,* 116 N.E. 387; *Rosenthal v. Brown,* 160 N.E. 921.

(8) The jury could certainly *infer* that defendant was required to give reasonable advance notice before changing plaintiff's limits from the following facts which had been introduced as part of plaintiff's case:

Defendant knew it was plaintiff's only broker (Rep. Tr. pp. 23-24); plaintiff built his large position to 267 contracts open in October (Rep. Tr. p. 98) upon the understanding that he could trade with defendant up to 300 contracts open (Rep. Tr. p. 41); defendant itself admitted that if a trader has a large open position and cannot trade he is exposed to a risk of financial loss (Rep. Tr. pp. 212-213, 61-62); see argument of counsel for defendant as to the volatility and rapid fluctuations of this market (Pretrial Rep. Tr. p. 4); as a result of defendant's action plaintiff was unable to trade from October 22 to November 3

before he could obtain another broker (Rep. Tr. pp. 56-65); this was a reasonable length of time under the circumstances (Rep. Tr. pp. 135, 136, 153).

(9) The parties *agreed* in the pretrial order as follows:

> "Sometime in March, 1965 the parties modified the above agreements and defendant agreed that it would accept orders from plaintiffs to buy and sell sugar futures contracts up to a maximum of 300 contracts open at any one time . . ." (Cl. Tr. p. 60.)

As noted above, plaintiff testified that it never received any notice prior to the act complained of that defendant was attempting to void this agreement. (Rep. Tr. p. 41.)

(10) The court itself at one point stated:

> ". . . if the jury should accept Mr. Greenberg's testimony—and this is not a ruling—as being true, the most they could find is that there was a contract to leave those limits open." (Rep. Tr. p. 113.)

Surely the jury could infer the necessity of a reasonable notice prior to an attempted change of that contract?

(11) Defendant's contention that no notice was necessary before it changed plaintiff's limits from 300 to 100 is itself one of the strongest indications of the necessary inference of reasonable notice. If defendant were correct, then the lowered limit of 100 could itself be changed without notice, thus rendering mean-

ingless the new "agreement" to take plaintiff's business up to 100 contracts open!

As noted above no findings were made by the court, so we cannot know the exact basis for its dismissal of plaintiff's complaint. In the event that the court's language at Rep. Tr. p. 269 that defendant's "binding promise" to handle all of plaintiff's business up to 300 contracts open was terminable at will without notice be taken as the court's basis for ordering judgment it is submitted that the evidence detailed above would have permitted the jury to find that reasonable notice was required, and that the court therefore erred in removing the case from the jury on this factual basis.

b. Fact Issue of Damages.

The trial court made some comment concerning the "speculative" nature of plaintiff's damages resulting from the placing of "hypothetical" orders. (Rep. Tr. p. 270.) However the court later, in explaining its order dismissing the complaint, stated that it found no liability and therefore "couldn't even get to the point of damages". (Rep. Tr. p. 271.) Since there are no findings we cannot know whether the court intended to decide the controverted issue of damages. In the event that it be argued that the court did, by the above language, without findings, determine such factual issue of no damages we submit the following upon which the jury could have found plaintiff's substantial damages:

(1) The court commented on "hypothetical" orders to show damages. (Rep. Tr. p. 270.) But the

uncontradicted testimony was that plaintiff actually transmitted to defendant seven specific orders. (Rep. Tr. pp. 51-54; Exhibit 75.) The court inferred that these were "hypothetical" orders because plaintiff "knew they would not be accepted". (Rep. Tr. p. 270.) The *uncontradicted* evidence, however, was that plaintiff did *not* know his orders would not be accepted. (Rep. Tr. pp. 52-54, 60-61, 197, 200.) Some of these orders actually were accepted by defendant. (Rep. Tr. pp. 52-54.)

(2) Plaintiff's specific monetary loss, of course, was clearly before the jury. Plaintiff showed that if defendant had taken his orders for specific contracts, as it was required to do, the actual cash value of those contracts would have been some forty-five thousand dollars more than cost (Exhibit 75) by the time plaintiff was able to end the damages flowing from defendant's conduct by securing another broker. (Rep. Tr. pp. 56-65.) Far from being "hypothetical", this sum was actual cash money plaintiff was entitled to withdraw from his account. (Rep. Tr. pp. 11-15.) *In re Rosenbaum,* 112 F.2d 315. See *Merrill Lynch v. Miller,* 401 S.W. 2d 645 re measure of damages as measured by the difference between cost of contracts wrongfully refused and their subsequent value. See also *Saddler v. Orton,* 161 Atl. 490; *Mekrut v. Gould,* 188 N.Y.S. 2d 6; *Opper v. Hancock,* 250 F.S. 668, affirmed in 367 F.2d 157; *James Wood v. Coe,* 191 F.S. 330. Baer and Saxon, *Commodity Exchanges and Futures Trading,* p. 309. It is not necessary for the customer whose order has been wrongfully refused to actually

place that order again before he can show damages; this was conceded by the trial court itself. (See Rep. Tr. p. 63 of pretrial conference; Meyer, *The Law of Stock Brokers and Stock Exchanges,* p. 546, sec. 134.) It is significant that defendant itself treated the question of damages as a *fact issue* in that it was about to introduce expert witnesses to testify as to the dollar amount of plaintiff's injury (Rep. Tr. pp. 264, 265)—minimal according to defendant, of course!

It is respectfully submitted that, if the trial court intended to find that plaintiff had suffered no damages the jury could have found to the contrary, under proper instructions on the above evidence, and that the court therefore erred in dismissing plaintiff's complaint on this ground—if, indeed, this was one of the court's grounds.

B. STRIKING PUNITIVE DAMAGES

Plaintiff's complaint alleged and prayed punitive damages. (Cl. Tr. p. 5.) During the course of the first day's trial, while plaintiff's first witness (himself) was still on direct examination the trial court ordered counsel for plaintiff to "skip" the subject of punitive damages for the time being (Rep. Tr. p. 79); at the end of the first day of trial it ruled as follows:

> "It is my ruling that the question of punitive damages will not be submitted to this jury and that all exhibits which purposes are to prove punitive damages are rejected." (Rep. Tr. p. 113.)

Appellant respectfully contends that this ruling constitutes the second principal error herein.

At the outset it should be noted that the above ruling came early during the presentation of plaintiff's case and effectively barred plaintiff from introducing any evidence whatever, oral or documentary, on the subject. In effect, the ruling granted defendant's pretrial motion on the subject (Cl. Tr. p. 429), the court having, at pretrial, reserved ruling thereon (Cl. Tr. p. 99). Since the court made no findings in the case, the record does not reflect the exact basis for the order, that is, whether it was deciding a fact issue or a point of law. Since plaintiff was precluded from introducing any evidence on the subject, it may be presumed that the court was ruling that punitive damages could not be recovered here, regardless of the fact circumstances.

An examination of the language used by the court at the time suggests that it may have been ruling on a point of law, as follows: punitive damages may be recovered in a contract case where a fiduciary relationship exists, but there could be no fiduciary relationship in this case because defendant would not take plaintiff's orders. (Rep. Tr. pp. 109, 113.) The essence of the court's thinking would seem to appear at Rep. Tr. p. 113, ls. 12-13:

> "I don't feel that any fiduciary relationship came into existence with respect to future orders."

Appellant is now in the rather anomalous position of attempting to show that there was a fiduciary rela-

tionship between the parties despite the fact that the trial court barred the introduction of any evidence on the subject. Nevertheless, we submit that the record, as it stands, forgetting about what additional evidence plaintiff might have introduced on the subject, shows at least the following:

1. Defendant *did* accept orders from plaintiff after October 22. (Rep. Tr. pp. 52-54; Cl. Tr. p. 58.)

2. Defendant's own answer admits that it continued to act as broker for plaintiff after October 22. (Cl. Tr. p. 40, ls. 13-14.)

3. The parties agreed in the pretrial order that defendant continued to act as plaintiff's broker with respect to certain orders until February 10, 1966. (Cl. Tr. p. 58, l. 23.)

4. Unlike the duties of a stock broker, the commodity broker's duties do *not* terminate upon execution of the order to buy or sell, but continue for a long time thereafter in carrying out those contracts in its own name with the exchange. (Rep. Tr. p. 14, Exhibit 59.) Frequently the broker is called upon to take physical delivery of the commodity for its client many months after the purchase of the contract. See *Volkart v. Freeman,* 331 F.2d 52 for an excellent discussion of the subject. For example, plaintiff late in *1964* through defendant as his broker, bought May, 1965 sugar futures contracts, upon which defendant became obligated to take delivery for plaintiff of some 14,200 long tons of raw sugar; defendant paid out for plaintiff over $100,000.00 for some 2,000 tons thereof

and was still involved in the transaction in August, *1965* (Cl. Tr. pp. 54-56), which was some eight or nine months after execution of the purchase order. At the time of the act complained of defendant had accepted and was carrying some 584 contracts for plaintiff (Exhibit 185), each of which defendant was obligated to execute for plaintiff *after* October 22.

It is clear that defendant, both at the time complained of, and for a long time thereafter, acted as plaintiff's broker. Regardless of whether certain particular orders were or were not taken by defendant after October 22, defendant was plaintiff's broker at the time of the act complained of, i.e., at the time of purported rescission of the Agreement to take plaintiff's business up to 300 contracts open. The fact that plaintiff *thereafter* tried, with varying success, to place certain orders did not terminate the status of defendant as plaintiff's broker; such fact goes only to prove extent of damages.

Defendant's argument that it is not liable as a broker because it refused to accept certain orders after the act complained of is akin to a doctor denying liability for malpractice on the ground that he refused to treat the patient after the malpractice!

Defendant concedes that an agent who breaches a fiduciary relationship is liable for punitive damages (Pretrial Rep. Tr. p. 72, ls. 21-24) and that a broker becomes an agent when it accepts its principal's order (Pretrial Rep. Tr. p. 80). See *Harper v. Interstate Brewery,* 168 Or. 26, 120 P. 2d 757; *Brown v. Coates,* 253 F. 2d 36.

It might be noted that, at the above-cited portion of the pretrial hearing the court, in considering this very question of punitive damages, stated:

> "Of course I have to wait to see what the testimony shows before I can even decide what the relationship of the parties was." (Pretrial Rep. Tr. p. 81.)

Yet in the very early stages of the trial the court ruled that plaintiff could not introduce evidence on the subject, as noted above.

Defendant states the rule on punitive damages in Oregon as follows:

> "Although it is true that in Oregon exemplary damages may be awarded where there is evidence that the wrongful act was done intentionally, without just cause or excuse and with knowledge of harm to a particular person or persons, McElwain v. Georgia Pacific (Dec. 28, 1966) 83 Or. Adv. Sheets 707, 708, 421 P. 2d 957 we call to the Court's attention that the rule decided in the Georgia-Pacific case involved a tort and not a breach of contract." (Cl. Tr. p. 478.)

(Since defendant concedes that a fiduciary may be liable for punitive damages (supra) the attempted distinction between tort and contract is, of course, immaterial here.)

In view of the fact that the court would not permit plaintiff to introduce evidence on the subject of punitive damages, the question of the sufficiency of the evidence to go to the jury would seem to be not before this court at the present time. Nevertheless,

appellant can point to the following facts in the record as it stands which would suggest that the jury might indeed find punitive damages here:

1. The relationship between the parties was a close one. (Rep. Tr. p. 88.)

2. Plaintiff became a member of the New York Exchange at defendant's suggestion. (Rep. Tr. p. 82.)

3. Defendant actively solicited plaintiff's orders. (Rep. Tr. pp. 15-16.)

4. Defendant was plaintiff's only broker, as defendant well knew. (Rep. Tr. pp. 23, 24.)

5. Defendant told plaintiff it would take plaintiff's business up to 300 contracts open and never told him otherwise prior to the act complained of. (Rep. Tr. p. 41.)

6. The matter of limits was vital to plaintiff because in dealing with actual physical sugar purchases and sales he had to know that his actuals could be protected by his futures contracts. (Rep. Tr. p. 24.)

7. In reliance on the limits of 300 plaintiff in October built his position to 267 contracts long (i.e., to *buy),* which contracts defendant accepted despite their claim that plaintiff's limits were 100 open after June, 1965. (Cl. Tr. p. 488.)

8. This large *long* position of plaintiff was built in connection with an actual transaction plaintiff was putting together at the time (Rep. Tr. p. 98); defendant knew of plaintiff's "actuals" (Rep. Tr. p. 189).

9. Prior to October 22 defendant's New York headquarters instructed its Portland office to see to it that plaintiff knew of the reduced limits (Exhibits 14, 15) and yet no word was given to plaintiff (Rep. Tr. p. 41), though plaintiff was in frequent touch with defendant immediately prior to the 22nd (Rep. Tr. pp. 57-58).

10. Defendant knew its action would cause plaintiff great harm, but defendant didn't care. (Rep. Tr. pp. 61, 62, 212, 213.)

11. Defendant admitted it could not have taken the action it did had it known that plaintiff did not know of the reduced limits. (Rep. Tr. p. 214.)

12. An act such as that done by defendant that is, changing limits without notice, is unheard of in the business. (Rep. Tr. pp. 136, 152.)

13. Immediately prior to October 22, on October 21, defendant told plaintiff that it (defendant) was going to sell the market (Rep. Tr. p. 190) ; since plaintiff was at the time extremely vulnerable in a *long* (buy) position at the time, as defendant well knew, plaintiff had to sell the market also to protect himself (Rep. Tr. pp. 100, 190), yet defendant arbitrarily prevented plaintiff from placing such orders (Rep. Tr. pp. 51-54) because he couldn't do business elsewhere for at least a week (Rep. Tr. pp. 135-136).

14. Plaintiff not only showed that defendant was guilty of a reckless disregard of plaintiff's interests but plaintiff attempted to go further to show the real reason for defendant's seemingly senseless action of

cutting down a good customer (Rep. Tr. p. 194) who was not in default in any way (Rep. Tr. p. 42), thus depriving themselves of substantial commissions. (For example, at the time of the act complained of, defendant was carrying some 587 contracts (Exhibits 34, 35) on which defendant had received commission of $7.50 each (Rep. Tr. pp. 45, 46) or $4,400.00.) The real motive of defendant in doing what it did appears in Exhibits 140, 141, 142, 162, 163, 164 and 190, which exhibits were refused by the court. (Rep. Tr. p. 119.) Particular attention is invited to Exhibit 190 a, c, e; even without accompanying explanation, it shows that defendant in October was *itself* in an extraordinarily exposed position in the market as compared with its normal activities, and that it was thus for its own personal gain, regardless of the consequences to its clients, that it took the action it did.

It is respectfully submitted that there is ample evidence upon which the jury could have found punitive damages here.

C. ROBINSON-PATMAN VIOLATION

Appellant contends that the trial court erred in refusing to permit the issue of defendant's alleged violations of the Robinson-Patman Act (15 U.S.C. 13c) to be submitted to the jury (Pretrial Rep. Tr. p. 48), or, in the alternative, to permit the jury to consider the issue of a common law breach of fiduciary duties entitling plaintiff to a return of commissions paid (Cl. Tr. p. 72).

The facts concerning these issues were not in the original complaint, though the same did allege that defendant breached fiduciary duties owed plaintiff. (Cl. Tr. p. 4.)

More than a month before pretrial (Cl. Tr. p. 434) plaintiff asked leave to introduce the above issues, and if needs be, to amend the Complaint (Cl. Tr. p. 450).

At the pretrial hearing plaintiff contended that the facts supporting these issues had only recently been established from defendant's records; that defendant had resisted discovery proceedings (Pretrial Rep. Tr. p. 24 et seq.) so extraordinarily that plaintiff could not have raised the issue sooner.

The docket (Cl. Tr. p. 544 et seq.) shows the following entries pertinent to appellant's contention:

Jan. 3, 1966—Return of summons served on defendant.

Jan. 10, 1966—Stipulation extending defendant's time to plead.

Feb. 14, 1966—Defendant's challenge to the sufficiency of the Complaint.

March 1, 1966—Order reserving ruling on complaint and Order defendant to answer by March 14, 1966.

March 11, 1966—Answer and Counterclaim filed.

March 24, 1966—Answer to Counterclaim filed.

April 15, 1966—Plaintiff's motion for production of documents filed.

April 21, 1966—Defendant's memo in opposition filed.

April 25, 1966—Plaintiff's motion for production granted.

June 24, 1966—Plaintiff's motion to require defendant to comply with above order filed.

June 30, 1966—Defendant's motion to postpone hearing of above motion.

July 21-25, 1966—Defendant's supporting documents in opposition to discovery filed.

July 25, 1966—Order granting discovery motion, in part.

Oct. 28, 1966—Plaintiff's interrogatories filed.

Nov. 7, 1966—Defendant's objections to interrogatories and motion to strike filed.

Dec. 5, 7, 1966—Orders granting plaintiff's motion, in part.

Jan. 18, 1967—Plaintiff's motion to require defendant to comply with above orders filed.

Jan. 20, 1967 to July 13, 1967—Proceedings relating to defendant's interrogatories and motion to produce.

Aug. 4, 1967—Plaintiff's second interrogatories filed.

Aug. 10, 1967—Defendant's objections to above filed.

At pretrial, August 21, 1967 plaintiff showed that as a result of defendant's resistance to discovery, as recited above, the evidence showing "bucketing", that is, that defendant in its London operations was actually taking the other side of plaintiff's contracts, was not produced by defendant until July, 1967. (Pretrial Rep. Tr. pp. 29-37.) This data had been sought by plaintiff from defendant since April 15, 1966 (Cl. Tr. p. 105); the court had repeatedly granted plain-

tiff's motions to enforce discovery, which Orders defendant had frustrated, as cited to the docket above.

Among the facts appearing in the pretrial order is the following: defendant corporation has a wholly owned subsidiary corporation in Panama, which, in turn, has a wholly owned subsidiary corporation in Switzerland, which, in turn, has a wholly owned subsidiary corporation in Britain. (Cl. Tr. p. 59.) Appellant offered to prove that through this chain of subsidiaries defendant was acting as a concealed principal in taking the other side of plaintiff's orders. (Pretrial Rep. Tr. p. 36.) Counsel for defendant stoutly protested that defendant would not do such an act because it was a serious criminal offense; counsel did not deny that his client's subsidiary, four times removed, had not done so, contending that the London operations had nothing to do with his client. (Pretrial Rep. Tr. pp. 43-44.)

The court indicated it was "impressed" with the reason for plaintiff's late motion to amend arising out of defendant's obstructions to discovery (Pretrial Rep. Tr. p. 28), and that plaintiff's motion was "not unreasonable" (Pretrial Rep. Tr. p. 48).

The court however denied the motion upon the ground that the trial would have to be continued if the issue were allowed into the case and that such continuance would upset the court's calendar, a particularly disturbing thing in view of the shortage of judges; secondly, the new issue would unduly complicate things for the jury. (Pretrial Rep. Tr. p. 48.)

Appellant respectfully contends that this ruling constitutes error.

In the recent case of *Brier v. Northern Calif. Bowling* (9th Circuit) 316 F. 2d 787 this court quoted the mandate of Supreme Court on the subject in *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 as follows:

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be freely given."

See also *Rosenberg v. Arnold* (9th Circuit) 283 F. 2d 406:

> "In view of the extreme liberality generally in favoring amendments to pleadings under the Federal Rules of Civil Procedure and the general policy thereunder of wrapping in one bundle all matters concerning the same subject matter, we hold it was error not to let appellant's amended counterclaim stay in the pleadings."

In *Northwest v. Gorter* (9th Circuit) 254 F. 2d 652 this court cited with approval *Robbins v. Jordan* (D. C. Circuit) 181 F. 2d 793, 794:

> "As was said in *International Ladies' Garment Workers' Union v. Donnelly Garment Co.,* 8 Cir.,

1941, 121 F. 2d 561, 563: 'The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment * * * Rule 15 of the Rules of Civil Procedure * * * expresses the same liberality with respect to the amendment of pleadings."

"There can be no question that a defendant should be protected from surprise resulting from a change of theory; but it is our opinion that the court erred in the method it chose to protect him. The proper procedure would have been to grant the defendant a continuance in order to meet the new evidence. But it was beyond the limits of its judicial discretion to refuse to allow the amendment."

In *Kirk v. U.S.* (9th Circuit) 232 F. 2d 763 this court said, at 770:

"The injunction of Rule 15 (a) with respect to applications for leave to amend pleadings is: 'and leave shall be freely given when justice so required.' In *Rossiter v. Vogel,* (2nd Circuit) 134 F. 2d 908, 912, it was held error for the court to proceed to enter a summary judgment after showing had been made which would justify an amendment of the pleadings. Here the strongest possible showing for amendment was supplied by the defendant's own answers to interrogatories. The refusal to permit such an amendment in itself constitutional reversible error."

In the instant case surely no bad faith or dilatory tactics could be charged to plaintiff, though defendant

was obviously guilty of many such measures, as is indicated by the above-cited repeated necessity of plaintiff to obtain second and third orders from the court to compel defendant to make discovery previously ordered.

No continuances of trial had previously been sought by plaintiff but defendant had been granted a trial continuance for the convenience of its employees who were on vacation. (Pretrial Rep. Tr. p. 25.)

It is difficult to see prejudice to defendant in the requested amendment, since *all* of the evidence pertinent thereto was and had always been, in its own records. (See *Montgomery v. Cagle,* 265 F.S. 469.) We here, of course, speak of the evidence that defendant, through its chain of wholly owned subsidiaries, was actually taking the other side of plaintiff's contracts. The resistance of defendant to discovery is indeed understandable.

See articles written by Justice Douglas while a professor at Yale University, on the subject of "bucketing," i.e., a broker taking the other side of its customers' orders. 41 Yale Law Journal 949, 43 Yale Law Journal 46.

See also cases collected at 149 A.L.R. 665 concerning disregard of the corporate entity in violations of the Robinson-Patman Act, that is, that defendant corporation cannot wash its hands of the acts of its wholly-owned subsidiaries.

The basis of the court's denial of plaintiff's motion, as noted above, was the fact that a postponement of

the trial would become necessary, this would disturb the court's calendar unduly in view of the shortage of judges; and that the new issue would unduly complicate things for the jury. (Pretrial Rep. Tr. p. 48.)

It should be noted that neither side was pressing for trial. (Pretrial Rep. Tr. p. 45.) It would seem that the problem of the court's calendar due to a shortage of judges would be aided by a continuance rather than the other way around.

As to whether the new issue would unduly complicate things for the jury, it must be pointed out that the court thereafter took the whole case away from the jury! The new issue was a simple one: do defendant's records show that it bought the other side of plaintiff's contracts? Rather than complicating the case, it would appear to simplify matters, since it would tend to show defendant's personal motive in taking the arbitrary action it did.

The matter of defendant's motive was, of course, already in the case: as noted above, the original Complaint alleged defendant's breach of fiduciary duties (Cl. Tr. p. 4), so that at least the alternate issue proposed (breach of common law fiduciary duty of agent entitling principal to return of commissions paid) constituted no radical innovation in the case.

Defendant, it would appear, was thoroughly familiar with the matter since it had been resisting discovery thereon for more than a year, as noted above.

If plaintiff had not sought to amend the complaint in this regard defendant might argue that the issue

would be barred by res adjudicata, since the original complaint alleged defendant's breach of fiduciary duties. See *Buckman v. G.M. Corp.*, 159 F. 2d 728.

Since one of the very purposes of pretrial is to consider the necessity or desirability of amendments to the pleadings (F.R.C.P., Rule 16) we submit that the trial court abused its discretion in denying plaintiff the right to introduce the issue into the case.

CONCLUSION

Appellant respectfully but earnestly submits that it is entitled to a jury trial on the merits of its claims (1) that defendant breached its agreements to take plaintiff's business, thereby causing plaintiff's damage, and (2) that it did so wantonly breach its fiduciary obligations as to call for punitive damages.

In the event that this court returns the case for determination by the jury of the above issues the Robinson-Patman issue should then be allowed, in conformity with the oft-expressed rule that a case should not be disposed of piecemeal.

Dated, San Francisco, California,
August 5, 1968.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Gerald J. O'Connor,
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